THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,
Petitioners.

against

DAVID J. WINN,
Respondent.

BRIEF FOR PETITIONERS.

Facts.

This Court granted an application for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review the judgment therein affirming a judgment of the Circuit Court against the petitioners. The certified transcript of the record filed with the application for the writ is before the Court as the return (Record p. 36) and we submit this the same brief.

The judgment of the Circuit Court of Appeals is final, except in case it be reversed on this Certiorari.

The case went up to the Circuit Court of Appeals upon a Writ of Error issued to the Circuit Court for the Southern District of New York to review the judgment of that Court entered therein on the 18th day of September, 1907, against the plaintiffs in error, and the orders of said Court, dated the 25th day of June, 1907, and the 31st day of July, 1907, respectively, in pursurance of which said judgment was entered (Record pp. 1-3).

The action, in which said judgment of the Circuit Court was rendered and said orders made, was brought at common law by defendant in error against plaintiffs in error to recover alleged damages claimed by him to have been sustained by him on contracts for the purchase of two hundred bales of cotton on the floor of the New York Cotton Exchange, which contracts he alleged he employed them to make in their own names, but in his behalf, and they sold out the same without calling on him for margins and without his consent (Record, 4-6).

Plaintiffs in error served their answer to the complaint, and therein deny that they were ever employed by defendant in error to buy any cotton or carried any cotton for him or gave him any credit; but they say that they bought a number of bales of cotton for one Bowman and gave him alone credit and frequently called on him for margin, and on his failure to give them margin, they sold out the cotton at a loss and notified him to pay them the balance and that in that lot of cotton were the two hundred bales claimed by defendant in error in his complaint to have been his (Record, 10-14).

After the service of the answer the counsel for defendant in error upon notice to counsel for plaintiffs in error made a motion before Mr. Justice Holt, sitting in Circuit to hear motions, for an order directing plaintiffs in error to exhibit their books before trial, permit defendant in error, his counsel and agents, to investigate, copy and make abstracts of same, and directing that plaintiffs in error, upon failure to comply with said order, should suffer judgment against them, as in cases of non-suit (Record, 6-14).

This motion was made under § 724 of the U. S. Revised Statutes (Record, 19).

Plaintiff's in error resisted said motion, on the grounds that the Court was without jurisdiction to grant an order directing an exhibit of books and papers *before the trial,* and if it had jurisdiction, such an exercise of discretion would not be correct (Record, 14-16; 21-22).

Mr. Justice Holt on June 25, 1907, granted the order asked for, and directed plaintiffs in error to comply therewith by the 15th day of July, 1907, and the order further provided that in the event the plaintiffs in error failed to comply, judgment against them should be entered by default (Record, 17-18).

The 15th day of July, 1907, was at least a year before the case could be reached on the calendar for trial (Record, 21).

With great respect for the learned judge who granted the order, the counsel for plaintiffs in error, informed them that he could not think that §724 authorized the order, and as he knew of no way to have it reversed until judgment was entered thereon, they felt it to be their duty to customers and their business to have the order

reviewed by the higher courts, and they authorized their counsel so to inform the counsel for defendant in error (Record, 20-21).

On July 16, 1907, counsel for defendant in error made a motion before Mr. Justice Hough for judgment against plaintiffs in error by default, pursuant to Section 724 of the Revised Statutes, and that a writ of inquiry be issued to the marshall to assess the damages (Record, 18-21).

Plaintiffs in error filed affidavits in opposition to said motion contending that the court had not authority to grant judgment or the writ, and that if it did it would be an improper exercise of discretion (Record, 21-22).

On the 31st day of July an order was made granting the motion (Record, 22-23).

The judgment was entered against the plaintiffs in error for $2,275, and $65.45 costs (Record, 26-27).

The plaintiffs in error thereupon sued out the writ of error already mentioned and filed an assignment of errors and the bond required by law (Record, 27-33).

The errors assigned raise the questions whether the Court had authority to enter the judgment and make the orders, and if it had authority, whether its discretion was properly exercised (Record, 27-30). The judgment was affirmed (Record 33-35).

Thereupon application was made to this Court for the Writ of Certiorari already mentioned.

POINTS.

I.

The decision of the court below in the case at bar construing Sec. 724 of the Revised Statutes of the United States as giving power and authority to Circuit Courts to order a party to an action at law to exhibit his books to the opposite party before the trial, is in conflict with the prior decisions of the Circuit Court of Appeals of the Third Circuit construing said section, and also in conflict with the decisions of Circuit Courts in other circuits construing the same section; AND IT IS IN CONFLICT WITH THE PLAIN LANGUAGE OF THE STATUTE, AND IS ERRONEOUS.

Said Section reads as follows:

> "Sec. 724. *In* the *trial* of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

This section of the revised statutes is Sec. 15 of an act entitled "An Act to establish the Judicial Courts of the United States," passed September 24, 1789.

1 U. S. Stats., 73, *82*.

On April 7, 1789, at the first session of the senate, Senators Oliver Ellsworth, of Conn., William Paterson, of N. J., William Maclay, of Penn., Caleb Strong, of Mass., Richard Henry Lee, of Va., Richard Bassett, of Del., William Few, of Ga., and Paine Wingate, of N. H. were appointed a committee to bring in a bill for organizing the judiciary of the United States.

1 Annals of Cong. 18.

This was to carry out the terms of the Constitution of the United States, which had been recently adopted by eleven of the original thirteen states, and which had provided in regard to the courts of the United States as follows:

> "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

U. S. Const., Art. III, Sec. 1.

On June 12, the committee brought in the bill.

1 Annals of Cong., 46;
Journal of Maclay, 74.

And it was discussed there, from time to time, until July 17, when, after being amended, it was passed and sent to the House on July 20th.

1 Annals of Cong., 48, 49, 659;
Journal of Maclay, 85, 88, 89, 91-93, 93-94, 95-96, 97-98, 98-100, 101, 101-102, 102-103, 104-105, 106-109, 117.

It was in the House from July 20, to September 17, when it was passed, with amendments, and reported back to the Senate.

1 Annals of Cong., 782-785, 796-820, 820-834, 888, 892, 894;
Journal of Maclay, 152.

On September 17, the Senate referred the bill to a committee composed of Ellsworth, Butler, of S. C., and Paterson.

1 Annals of Cong., 80.

On September 19, the Senate reported to the House that it concurred in some amendments and disagreed as to others; and on September 21, the House re-considered the amendments disagreed to by the Senate and adopted them (*sic*).

1 Annals of Cong., 903, 904.

It is seen from the foregoing that Senator Paterson of N. J., was not only a member of the Judiciary Committee; but he was one of the three members appointed by the Senate to consider the bill when sent back by the House with amendments.

On March 4, 1793, William Paterson was commissioned as one of the Associate Justices of this Court; and was assigned to the Middle Circuit, composed of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia,

and he sat with Mr. Justice Peters in the district of Pensylvania, in April, 1795.

2 Dallas, 331.

And before that court, so composed, in April, 1795, the first reported case involving a construction of Sec. 15 of the Judiciary Act, now Sec. 724 of the Revised Statutes, came up.

Geyger's lessee *v.* Geyger, 2 Dallas, 332.

The statement in the case says:

> "A rule has been obtained by the plaintiff, requiring the defendant to show cause why an order should not be made for the production of certain deeds and papers, *on the trial* of this cause, agreeable to the 15th section of the judicial act; and now, it was moved to make the same absolute.
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> But, for the *defendant*, it was contended, that the notice of the rule should have been given to the party, and not to his attorney."

The Court said that the act did not designate to whom the notice should be given, the party himself or his attorney; and went on to say:

> "But we will always keep the case under our control, for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason *to postpone the trial*, until a full opportunity has been afforded for the attorney's communicating the rule to the client."

That language shows that there was no thought in the minds of Mr. Justice Paterson and Mr. Jus-

tice Peters that books could be ordered shown to the opposite party at an earlier time than "on the *trial,*" where the party applying could be cross-examined by his opponent, and the relevancy of the documents determined by the court on *evidence* and any other question as to the right of the party to see the books determined in a plenary way.

There was no dream in the minds of the Senators, when the act was passed, that an *inquisition* into the books and affairs of a party to an action at law could be instituted *before the trial.* This is shown by the debate which occurred on a clause in the bill, as first drawn, which *required a defendant, on oath, to disclose his or her knowledge in the cause, etc.,* and which, after debate, was stricken out. Senator Maclay's report of the debate says:

> "We got on to the clause where a *defendant* "*was required on oath, to disclose his or her* "*knowledge in the cause, etc.,* I rose and de- "clared that I wished not to take up the time "of the committee, as, perhaps, few would "think with me (this I said in allusion to "what had happened in the committee when "I had exerted myself in vain against this "clause), but that I could not pass in silence "a clause which carried such inquisitorial "powers with it, and which was so contrary "to the sentiments of my constituents; that "extorting evidence from any person was a "species of torture, and inconsistent with the "spirit of freedom. But perhaps I should "say something more pointed when the mat- "ter came before the House in Senate. (My "reason of acting thus was: I had spoken to "Mr. Morris and found he would not second "me in it, as Myers Fisher had not taken no- "tice of this matter in his letter.) Patter-

"son, however, of the Jerseys, sprang up; "declared he disliked the clause, and having "spoken a while moved to strike it out. I "then rose and declared, since one man was "found in the Senate for striking it out, I "would second him.

"Up now rose Elsworth, and in a most "elaborate harangue supported the clause; "now in chancery, now in common law, and "now common law again, with a chancery "side. He brought forward Judge Black- "stone, and read much out of him. Patter- "son rose in reply, and followed him through "these thorny paths, as I thought, with good "success. He showed justly enough, that "Blackstone cut both ways, and nothing "could be inferred from him but his ridicul- "ing the diversity of practice between chan- "cery practice and that of common law. Els- "worth heard him with apparent composure. "He rose with an air of trumph on Patter- "son's sitting down. 'Now,' said he, 'every- "'thing is said that can possibly be said to "'support this motion. The very most is "'made of it that ingenuity can perform'; "and he entered again the thorny thicket of "law forms, and seemed to batter down all "his antagonist had said by referring all "that was advanced to the forms of law, "with which everything had been shackled "under the British Government. He really "displayed ingenuity in his defense. He "made repeated use of the term 'shackled,' "and how we were now free, and he hoped "we would continue so.

"I determined to have a word or two at "the subject. Said I was happy to hear that "the world was unshackled from the customs "of ancient tyranny; that there was a time "when evidence in criminal cases was ex- "torted from the carcass of the wretched cul- "prit by torture. Happily we were un- "shackled from this, but here was an at-

"tempt to exercise a tyrany of the same "kind over the mind. The conscience was to "be put on the rack; that forcing oaths or "evidence from men, I considered as equally "tyrannical as extorting evidence by tor- "ture; and of consequence had only the dif- "ference between excusable lies and wilful "perjury. I hoped never to see shackles of "this kind imposed. Chancery had been "quoted; common law had been quoted as "practiced in England, but neither would "apply to the present case. The party was "to answer in chancery, but it was to the "judge, and his questions were in writing; "but here, by the clause, he must be examin- "ed in the open court before the bench and "jury and cross-examined and tortured by "all the address and malice of the bar. I "had further to add that, by the Bill of "Rights of the State that I had the honor to "represent, *no person could be compelled to "give evidence against himself;* that I knew "this clause would give offence to my con- "stituents.

"Elsworth rose and admitted that three "new points had been started. He aimed a "reply, but I thought he missed the mark in "every one. The rage of speaking now "seemed to catch the House. Bassett was "up; Read and Strong [were] at it. We sat "till half after three; and an adjournment "was called before the question was put. "Elsworth moved an amendment that the "plaintiff, too, should swear at the request "of the defendant, just before the House ad- "journed.

"*June 30th*—I am still miserably lame with "the rheumatism. Attended at the Hall at "the usual time. The clause with Elsworth's "amendment was taken up. I rose first. "Said that instead of the clause being amend- "ed, I thought it much worse; that it was

"alleged with justice against the clause, as "it stood before, that great opportunities and "temptations to perjury were held out, but "this was setting the door fairly open. The "contest now would be, who would swear "most home to the point. If I was against "it before, I was much more so now. Mr. "Lee rose, and seemed to mistake the mat- "ter. I rose and endeavored to do the busi- "ness justice.

"Up rose Elsworth and threw the common "law back all the way to the wager of law, "which he asserted was still in force. Strong "rose and took the other side in a long har- "angue. He went back to the ancient trial "by battle, which, he said, was yet unre- "pealed, but said repeatedly there was no "such case as the present. Elsworth's tem- "per forsook him. He contradicted Strong "with rudeness; said what the gentleman "asserted was not fact; that defendants were "admitted as witnesses; that all might be "witnesses against themselves. Got Black- "stone; but nothing could be inferred from "Blackstone but such a thing by consent. "Patterson got up, and back he went to the "feudal system. He pointedly denied Els- "worth's position. Bassett rose. Read rose, "and we had to listen to them all. The ques- "tion was, however, put first on Elsworth's "amendment, and was last; next on striking "out, and it was carried."

Journal of Maclay, 92-94.

If the inquisitorial clause was striken out, the Senate could not have imagined that Sec. 15 of the act would ever be held to empower a court to make a party exhibit what he had written in his books, before there was a plenary hearing on the trial as to relevancy, or whether the party applying had any right to see them.

If any one was competent to know what was in the minds of the legislators who passed section 15 of the Judiciary Act, it was Mr. Justice Paterson.

In Carson's "History of the Supreme Court", it is said of him: "He served as a member of the judiciary committee, and next to Ellsworth, took the most active work of framing the Judiciary Act".

Carson's Hist. of Supreme Ct., 184.

The practice stated in Geyger's lessee *v.* Geyger, *supra,* at which Mr. Justice Patterson presided, remained the practice; and it was not questioned for years, which instance will be noticed later.

In 1806, Bushrod Washington, an Associate Justice of this Court, was attending circuit in the District of Pennsylvania, and a case came before the Court at which he was presiding in which one of the parties had been notified under Section 15 of the Judiciary Act to produce in the trial a will; and the will was handed to the Court; but Mr. Justice Washington would not let it be put in evidence, on the ground that it would not be proper under a bill of discovery.

Hylton *v.* Brown, 1 Wash., C. C. 298.

In 1818, when Associate Justice Washington was again presiding in the District of Pennsylvania, another case came up before him for trial; and the defendant moved for non-suit against the plaintiff on whom he had served only notice to produce at the trial, and apparently not containing a clause that he would move for non-suit in case the papers

were not produced. Mr. Justice Washington, in denying the motion for non-suit, said:

> "In every case, the party claiming the papers must give *evidence* of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or a non-suit, is intended to be claimed, the notice to produce papers must give the party information that it is intended to move for a non-suit; or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the Court under this section of the act of Congress."
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> Bas *v.* Steele, 3 Wash. C. C. 381.

It will be observed that "evidence" is spoken of in that case—not *affidavits.*

In 1821, a rule upon the plaintiff to show cause why he should not produce certain books, papers, and accounts *at the trial* of a case was applied for before Mr. Justice Washington sitting in the same Court; and he said, as to whether the order to show cause should be made absolute:

> "We think it need not be so, but that upon the rule to show cause it may be made *nisi,* leaving the Court at liberty to enforce the rule, unless the plaintiff can show, *at the trial,* good cause for not producing them. If the rule be made absolute at the time when it is argued, the Court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not. If the case should be simple, and such inquiry should not appear to be necessary, the Court may at once discharge, or make the rule absolute."
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> Dunham *v.* Riley, 4 Wash. C. C. 126.

It can be seen from that language, that, whether the rule was absolute *or nisi,* the *production* was to be "at the trial."

Thus the practice of having the production only at the trial, as it obtained at the trial presided over by Mr. Justice Paterson, prevailed for thirty-three years after the act was passed; and it does not appear to have been questioned for two years afterwards.

In 1823, however, in a case in the Circuit Court of the District of Columbia the plaintiff, having given notice, moved the Court for an order on the defendant to produce his bankbook and surrendered vouchers, by a certain day *before* the trial; and notwithstanding the Act and the case presided over by Mr. Justice Paterson in 1793 were cited, the Judge, without any reason reported, ordered the defendant to show his bank-book and surrendered vouchers to the plaintiff's counsel before the trial.

Central Bank *v.* Tayloe, 2 Cranch. C. C. 427.

But in 1829, the Circuit Court of the District of Columbia, in another case, held, that plaintiff's counsel had no right to examine defendant's letter books before the trial, to see whether there were not something in them pertinent to the issue.

Triplett *v.* Bank, 3 Cranch. C. C. 646.

In 1835, in that same Court it was held that it was not too late after the jury is sworn, to call for the books which the Court has ordered to be produced at the trial.

Waller *v* Stewart, 4 Cranch. C. C. 532.

It would thus appear that it became the practice of that Court to order the books produced *at the trial.*

Not until 1846, does the practice that was followed in the cases before Mr. Justices Paterson, Washington and the later judges of the District of Columbia appear to have been varied from or again questioned—a period of more than half a century after the act was passed—until a case came before Judge Betts, of the District Court of New York, sitting in the Circuit Court, and he held that the plaintiff could be required to show his papers to the defendant *before* the trial. But he so decided under the influence of the rule which permitted it in the State Courts of New York.

Jacque *v.* Collins, 2 Blatch. C. C., 23.

In 1851, in another case before the same judge, the plaintiff asked for an order, upon a notice and affidavit, requiring the defendant to exhibit his books and papers; but he denied the motion upon the ground that they could not be seen under a bill of discovery.

Finch *v.* Rikeman, 2 Blatch., 301.

In 1853, the question whether the section gives the power and authority came before the Circuit Court of the District of Massachusetts, where Benjamin R. Curtis, an Associate Justice of this Court, presided.

Iasagi *v.* Brown, 1 Curtis, 401.

In that case, at p. 402, Mr. Justice Curtis said:

> "It (the Act of Sep. 24, 1789, 1 Stat. at Large, 82, §724), does not enable parties to

compel the production of papers before trial, *but only at the trial,* by making such a case, and obtaining such an order as the act contemplates."

"The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the Court should not decide finally on the materiality of the paper, except *during the trial;* because it would occupy time unnecessarily, and it might be difficult to decide beforehand, whether a paper was pertinent to the issue; and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty *during a trial, after the nature of the case, and the posture and bearings of the evidence are seen."*

In 1868 another case came up in the District of Massachusetts; and then Nathan Clifford, an Associate Justice of this Court, presided, and he followed the former decision of Mr. Justice Curtis.

Merchants Nat. Bk. *v.* State Bk., 3 Cliff., 201.

In 1879, two cases arose in the District Court of New York, and Choate, District Judge, followed the decision of Judge Betts in 1846 in Jacque *v.* Collins, holding that inspection of books could be had *before* the trial, under the influence of the State practice.

U. S. *v.* Youngs, 10 Ben., 264.
U. S. *v.* Hutton, *Ib.*, 268.

But in 1885, a case came up before the Circuit Court for the Southern District of New York, at

which Mr. Justice Wallace presided; and the Court, citing the case of Beardsley *v.* Littel, 14 Blatch., 102 (1877), decided by Samuel Blatchford, afterwards an Associate Justice of this Court, held that § 724 did not permit an examination of a party's books *before* trial. And thus he did not follow the above decisions of District Judges Betts and Choate, but those of Associate Justices Paterson, Washington, Curtis and Clifford.

Colgate *v.* Compagnie Francaise, 23 Fed., R., 82.

In 1887, the question came up before Mr. Justice Lacombe of the Circuit Court of the same District, and he followed the decision of Mr. Justice Wallace, and said:

> "This is an application under the United States Revised Statutes, § 724, to require the plaintiff, the official liquidator of Charles Fortin & Co., of Paris, France, to produce for inspection of the defendants, in order to enable them to prepare for trial, all the business books of that firm from the years 1872 to 1878, inclusive. A similar application made in the case of Colgate *v.* Compagnie Francaise, was denied by Judge Wallace (January 1884), on the ground that the proper practice to obtain such relief in this circuit is by bill of discovery. A statement of the considerations which have induced the adoption of such practice will be found in the report of the same case, upon demurrer to bill of discovery, in 23 Blatch., 86, 23 Fed. Rep., 82.
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> The motion is therefore denied."

Guyot *v.* Hilton, 32 Fed. Rep., 743, 744.

Thus the question seemed settled in the Southern District of New York that an inspection of books was not authorized under § 724 *before* the trial.

But in 1899, a case came before District Judge Bradford, of the District of Delaware, sitting in Circuit, and he, reviewing a number of cases, decided that an inspection of books and papers before trial was allowed under § 724. He cited Central Bank *v.* Tayloe, *supra,* as the leading authority for his decision; and curiously enough he overlooked the prior cases of Bas. *v.* Steele, *supra,* and Dunham *v.* Riley, *supra,* and he cited the case of U. S. *v.* Youngs, *supra,* and U. S. *v.* Hutton, *supra,* of the District Court of New York, as authorities for his decision, and overlooked the cases of Colgate *v.* Compagnie Francaise, *supra,* and Guyot *v.* Hilton, *supra,* of the Circuit Court of New York, which were authorities the other way. The learned Judge was in error besides in supposing that some of the cases he cited as authorities for his decision were such.

Bloede *v.* Bancroft, 98 Fed. Rep., 175.

In 1902 the above case was cited in a case before Mr. Justice Lacombe, and he was so impressed by the opinion that he considered it exhaustive as showing that the weight of authority was in favor of granting the motion to see the books of the plaintiff, and so he followed that authority and granted the motion.

Gray *v.* Schneider, 119 Fed. Rep., 474.

But in the meantime, viz., in 1896, a case had come up in the Circuit Court of the District of New Jersey, and Green, District Judge, sitting in that court, said of § 724:

> "Within the terms of this statute alone must be found, then, the right of the plaintiff to ask for and receive the discovery it seeks; * * * . But by the very words of the statute the exercise of the power vested in federal courts to require production of such books or writings is limited to causing such production to be made at the trial. The words are not, broadly, 'in any action at law at any time' the court may require the production of books, but there is an express limitation found in the words 'on the trial of any action.' It is, then, at that particular time—at the trial, and at no other time—that the court may, in its discretion, order books to be produced; and that this is the proper construction of this statute is settled by many well-considered cases."
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> United States *v.* Nat. Lead Co., 75 Fed. Rep., 94, *95*.

While the learned Judge quotes the Statute as reading "on the trial of any action", when it reads "in the trial of actions", that only shows that he considered "in" to be equivalent to "on"; and in that, it is submitted that he was right.

And in 1894, a case came up in the Circuit Court of the District of Connecticut, Townsend, Circuit Judge, sitting, and it was considered that the production of the books were to be at the trial.

> Kirkpatrick *v.* Pope, 61 Fed. Rep., 46, *47*, *49*.

Thus it will be seen that the learned Judge in Gray *v.* Schneider, *supra,* fell into error in considering that the weight of authority, as claimed in Bloede *v.* Bancroft, *supra,* was in favor of motions to see books *before* trial, and in giving up his own opinion as expressed in Guyot *v.* Hilton, *supra.* While the Delaware case is well reasoned, it has been seen not to be exhaustive; and, with great respect, it is submitted that it is not sound; and its authority has been overruled by the Circuit Court of Appeals of the Third Circuit.

In 1907, the case of Bloede *v.* Bancroft was considered in a case that came up before the Circuit Court of Appeals, and that court pointed out omissions and errors in it, and after considering many authorities said:

> "We conclude, therefore, that section 724 does not confer the power to require a party to produce books before trial".
>
> Cassatt *v.* Mitchell C. & C. Co., 150 Fed. Rep., 32, 44.

Two cases that were heard at the same time involving the construction of § 724 were brought up to this Court by *certiorari* and reversed, but on the ground that the order was only interlocutory, and not on the ground that the section had been misconstrued (207 U. S., 181, 187.) The case of Cassatt *v.* Mitchell, *supra,* seems not to have been carried up and remains the law in the Third Circuit. And that is the law in that Circuit now, as is seen in another case.

> Penn. R. R. Co. *v.* Int. C. M. Co., 156 Fed. Rep., 765.

The attention of the Circuit Court of Appeals on the hearing of the case at bar was called to those two cases decided by the Circuit Court of Appeals and they were considered; but the learned Court of the Second Circuit declined to follow them, and said:

> "The question whether under Sec. 724 a party could be required to produce his books and papers before the trial is one which has been frequently considered; the decisions rendered in different districts are not harmonious. * * * It is unfortunate, perhaps, that there should be diversity in the practice in different circuits, but the remedy for that would be an application for *certiorari* to the Supreme Court."

The petitioners applied to this Court for the writ of certiorari and it was granted; and they now submit that the learned Court below has erred in its judgment affirming the judgment of the Circuit Court.

In addition to what has been said in the cases cited from the Circuit Court of Appeals of the Third Circuit and from the cases in the other Circuits, and in the debate that occurred in the Senate when Section 15 of the Judiciary Act was passed, it is submitted that the language of that section, now Section 724, is plain to the effect that books and papers, in actions at law, are not to be shown to the opposite party involuntarily before the trial. The section does not say "in actions at law." It says: "in *the trial of* actions at law." If the eminent body, much learned in the law and well grounded in the basic principles of our government, had intended that books and papers should be shown to the opposite party *before* the trial,

they would not have used the extra words "the trial of," but would have simply said "in actions at law." The several lawyers, who dealt with the bill, certainly knew the force and meaning of words; and they should not be held to have used three surplus words unnecessarily, or the word "in" for "before."

Again, there were amendments to the bill; and, as one clause stricken out provided for an *inquisition,* it is possible and perhaps more than possible, that the three words, in "the trial of," were inserted by way of amendment of the section to put it as nearly in accord as possible with the tenor of the bill, after the obnoxious clause was stricken out.

Moreover, it was going far enough to allow questions of relevancy and the right of a party to see books to be decided *in the trial,* without pleadings on those points, the same as they would be decided in proceedings in chancery on a bill of discovery. In a bill of discovery the proceedings are plenary and heard upon pleadings and proofs where each side can cross-examine. In the trial of an action at law, the section dispenses with pleadings; but it does not dispense with the right to cross-examine. It was intended that the hearing should be in the place of a plenary suit. No other legislative body had before granted such power to a common law court.

1 Thompson on Trials, §731.

Not one word is said in the Statute about the hearing as to right to see and relevancy being on *affidavit.* It says "upon notice." Of course, as right and relevancy were to be decided in the trial,

no affidavit was necessary; for the Court would hear the "evidence."

It is submitted that only in connection with the other testimony in a case can the Court know what right the applicant has to see books and papers and the relevancy. There is no fairness vouchsafed in a hearing of these questions on affidavits. There is no chance to see and cross-examine the affiants, and it gives an undue advantage to those who are willing to swear anything when there is no cross-examination. Besides, the Judges cannot know by affidavits what are the real facts involved in the case and these affidavit contests are a burden upon them and a nuisance to lawyers. Besides, it is possible for a party to get an order to inspect his opponents' books *before the trial,* without making any affidavit himself under the construction given §724 by the learned Court below. Indeed, it was done in the case at bar. Winn made no affidavit at all! And yet he got an order giving him or his lawyer leave to see and inspect petitioner's books for two years and copy the same—whether the accounts were in his name or that of P. G. Bowman, or that of the Sumter Bank, two parties not made parties to the action! From discretionary interlocutory orders in the Federal Courts there is no appeal except as to injunctions and reviews.

26 Stats. 828, §§6, 7.

In a State Court there would be.

The fact that the Statute provides that the party failing to show books shall suffer "nonsuit" or "default," as the case may be, shows that it was to be at the trial; for, as pointed out in Cassatt *v.* Mitchell, *supra,* that was the only time when a nonsuit or default could be granted in those days.

The clause "in cases and under circumstances where they might be compelled to produce by the ordinary rules of proceedings in chancery," contained in the section, does not refer to *time*. The clause says "in *cases* and circumstances *where*." That means that if the books and papers were relevant in chancery, they would be in the trial of an action at law. The case of Hylton v. Brown, *supra*, illustrates the value of that phrase in the section.

The construction placed upon §724 by the Court below would make it possible in a case pending in New York to require a party living in California to produce his books in New York *before* the trial, and also at the trial. Or, if his adversary concluded not to use them after seeing them, it might nevertheless be necessary for the party owning the books to bring them to the trial. Such a possibility shows that the authors of the Act never contemplated such a construction being placed on it.

The Act should be construed under the lights then existing. As was said by Mr. Justice Wallace in a case already cited:

> "There can be no ebb and flow of jurisdiction dependent upon external changes."
>
> Colgate *v.* Compagnie Francaise, *supra*.

The petitioners have a right to keep their books and papers a secret under the common law and the Constitution, and §724 should be construed strictly, like an attachment statute.

> Entrich *v.* Carrington, 19 Howell St. Tr. 1029.
>
> Boyd *v.* United States, 116 U. S., 616, 626-27.

Congress having provided for discovery, there is no other authority. The Statute of New York and the practice in that State can not affect the question.

Ex parte Fisk, 113 U. S. 713.
Amy *v.* Watertown, 130 U. S. 301.
Pierce v. Un. Pac. R. Co., 47 F. R., 709.
Hanks D. Ass'n. v. Tooth Av. Co., 194 U. S., 303.
Shumacker v. Security Co., 159 F. R. 112.

II.

The judgment below should be reversed.

Respectfully submitted,

JOHN R. ABNEY,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 12.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BASSETT and STEWART TATE,

Petitioners,

vs.

DAVID J. WINN,

Respondent.

BRIEF FOR RESPONDENT

JOHN W. GOODWIN,
ERNEST F. BALDWIN,

Counsel for Respondent.

Supreme Court of the United States,

OCTOBER TERM, 1910.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRET TATE,
Petitioners,

AGAINST

DAVID J. WINN,
Respondent.

BRIEF FOR RESPONDENT.

The only question for review in this case is whether the Court had *power and authority* under Section 724 of the Revised Statutes to make the order of June 25th, 1907, for a discovery of books, &c. (pp. 17 and 18 of the Record), and to make the order of July 21st, 1907, declaring the plaintiffs to be in default for not obeying the order of June 25th, 1907, and authorizing judgment to be entered against them by default (pp. 22-23 of the Record), and to enter judgment against the petitioners in accordance with that order (pp. 26-27 of the Record).

There is no question raised but that, if the Court

had that power and authority, and exercised its discretion to make those orders, that discretion was properly exercised.

All of the facts necessary to sustain the order, if the Court had power and authority to make it, were found by the Court below, and will not be reviewed here. In other words, the Court below found that it was established that the books and writings ordered to be produced, were in the possession or power of the defendants in the case, the petitioners here, and that they contained "evidence pertinent to the issue," and that the record presented a case and circumstances where the petitioners might be compelled to produce the books and writings ordered to be produced "by the ordinary rules of proceeding in chancery," as provided by Section 724 of the Revised Statutes.

Nor is any question raised on the record that if the Court had the power and authority under Section 724 to order the production of these books before trial, the plaintiff, the respondent here, did not pursue the *right practice* to obtain their production, and to recover the judgment on the failure of the petitioners to obey the order for their production.

The statement as to the various steps taken below, contained in pages 1 to 4 inclusive of the Petitioners' Brief, is substantially correct and need not be repeated here.

POINTS.

I.

Section 724 of the Revised Statutes authorizes and empowers the Circuit Court to make an order for the production of books and writings before the trial of the action, as well as on the trial, upon motion, where facts are presented to it by affidavit or otherwise showing that such books and writings are in the possession or power of the party from whom the same are required, and that they contain evidence pertinent to the issue, and the orders and judgment complained of were therefore valid.

Section 724 of the Revised Statutes reads as follows:

> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

It is a substantial re-enactment of Section 15 of an act entitled "An Act to Establish the Judicial

Courts of the United States," passed September 24th, 1789. That section was enacted, among other things, for the purpose of providing a summary way in which a party to an action at law might procure the discovery of books or writings in the possession or power of the other party, and not be compelled to resort to the cumbersome method provided by a bill of discovery. And it expressly provided that this summary method could only be resorted to "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

The method by which such discovery of books and papers could be compelled "by the ordinary rules of proceeding in chancery" was by bill of discovery, and by that method, discovery of such books and papers could be, and had to be, compelled before the trial of an action at law.

Story on Equity Jurisprudence, Section 1485.

2 Daniel's Chancery Practice, 1556.

As we have said, the 15th Section of the Judiciary Act was intended to provide a summary way to obtain the discovery of books and writings, in the furtherance of justice.

Such summary methods by which a party to an action at law can obtain a discovery and inspection of books and papers in the possession of the other party, containing evidence pertinent to the issue, *before the trial,* have in most of the States, and in England, been provided by statute, and furnish the common method of procedure in such cases, and if it be that Section 724 of the Revised Statutes above referred to does not authorize and empower the United States Courts to grant such discovery and inspection, those Courts are without a power exercised by most of the State Courts, and by the English Courts.

In New York, Sections 803 to 808 of the Code of Civil Procedure provide such a summary method, and in England it is provided by the Common Law Procedure Act, 17 and 18 Victoria, Chapter 125, Section 50, and in that statute, as in the New York statute, and in the statutes of most of the States, the application is made by *affidavit,* showing the possession of the books by the other party, and their pertinence to the issue.

And the vast weight of authority in the United States Courts as to the power of the Court to grant an inspection under Section 724, *before the trial,* is in favor of such power, so that such power is sustained by principle as well as by authority.

We have carefully examined the cases cited by the petitioners in their brief on this application, with the following results:

GEYGER'S LESSEE *vs.* GEYGER, 2 Dallas, 332:

The question whether the Court could, under Section 15 of the Judiciary Act, order the production of books or writings *before* the trial, or *at* the trial, was not raised, discussed or considered in this case. The *motion was* that the books, etc., be produced *"at the trial,"* and the only point raised or decided was that notice to the attorney was sufficient notice. The Court incidentally remarked that it would see that the client had plenty of time to produce the books, and to that end would, if necessary, adjourn the trial.

LESSEE OF HILTON *vs.* BROWN, 1 Wash. C. C., 298:

This was an action of ejectment. On the trial, before the impaneling of the jury, the defendant read a notice to plaintiff's counsel to produce *at the trial* a Will of one Griswold who, by deed, had leased the land to the plaintiff. It was objected that the application was premature, and could not

be made except during the trial, after a jury had been impaneled. The Court denied the motion, but on exactly what grounds does not appear, except that the Court had no proof before it that the Will was "pertinent to the issue," and only when that proof was furnished, could it tell whether the Will ought to be produced or not. There was no affidavit on the motion showing that it was pertinent. The jury was then impaneled, and the plaintiff offered evidence of his title, and that it came through Griswold. The defendant then went on with his case, and renewed his motion that the plaintiff produce the Will, and the plaintiff handed it to the Court, but insisted that it was not a case in which under the Act he was compelled to produce the Will, as it had not been shown that it was "evidence pertinent to the issue," and that he could not have been compelled to produce it "by the ordinary rules of proceeding in chancery." The Court, WASHINGTON, *J.*, said:

> "The remedy provided by the Act of Congress is merely cumulative; *and to save the time and expense of a bill of discovery*, it enables the court to do in a *summary way* what they might do if a *bill of discovery were filed* on the equity side of the court, and no more."

He then proceeded to show that the discovery of such a paper could *not have been obtained* by such a bill, because it could only tend to defeat the plaintiff's title, and not to prove title in the defendant. The rest of the case is on other points.

The case is barren, as we read it, of any adjudication, or even opinion, as to the construction of the 15th section of the Judiciary Act, as to whether a discovery can be ordered before the trial on motion and affidavit, or by petition, showing that the document of which discovery was sought was "pertinent to the issue."

BAS *vs.* STEELE, 3 Washington C. C., 381:

This was an action for damages against the Collector of the Port of Philadelphia for refusing to clear a Spanish vessel. After the suit was commenced, but before the trial, the defendant's counsel gave notice to the plaintiffs to produce certain documents and papers *on the trial,* and *at the trial* called for them. Counsel for the plaintiffs stated that the plaintiffs did not have the documents and papers, and that they were not in existence, except a log book of the vessel, which was on the vessel at Havana, and some other papers which seem to have been produced and put in evidence. Thereupon the defendant's counsel moved for a non-suit on several grounds, one of which was that the 15th section of the Judiciary Act, now Section 724 of the Revised Statutes, gave him that right. The plaintiff's counsel opposed the motion on several grounds, among which was that the provisions of that Act "applied only where a *motion had been made* to the Court for an order on the party to produce the papers, followed by a notice thereof, and some evidence that the party called upon for them had them in his possession, and that they were pertinent to the issue" (p. 385).

The Court denied the motion on all the grounds urged, and in respect to the ground of the non-production of the papers, he rested his decision on the following reasons, as will be seen from the opinion, pages 386, 387: (1) It was not shown that the party called on for the papers had them, or that they were pertinent to the issue. (2) That the uncontradicted evidence was that the plaintiff had not the papers, and that they never existed. (3) That no notice had been given to the plaintiff of any motion or application for a non-suit, as a consequence of his not producing the papers.

The question as to whether the Court *had the*

power to order the production of the papers *before* or *at* the trial was not raised or discussed at all. As we have pointed out, the notice was to produce them *at the trial.* The case has no bearing on the question under discussion in the case at bar.

DUNHAM *vs.* RILEY, 4 Wash. C. C., 126:

This was an application or motion for a rule or order to direct the plaintiff to produce certain books and papers *at the trial.* It was made in advance of the trial on notice. The Court held that it was properly so made, and that an order in advance of the trial was necessary, and the only other question considered was whether the order should be absolute in the first instance, or *nisi.* The Court said it *might* be *nisi,* and so made it. It was not held, or even intimated that the order might not, in the discretion of the Court, and on a proper showing be made absolute for the production of the books in the first instance. The case, however, does not bear in any way on the question as to whether the Court had the power to order the production of books, etc., for inspection before the trial. The point was not at issue, and was not considered or decided.

CENTRAL BANK *vs.* TAYLOE, 2 Cranch, C. C., 427:

(Decided 1823.)

This was an action of assumpsit on open account, and for moneys lent and advanced. This is the *first case* in the United States Courts, which is reported, in which a motion was made *before the trial* for the production of books and papers for inspection *before the trial,* under Section 15 of the Judiciary Act of 1789 (1 Stat. at Large, 73). It brought the question here at issue squarely up for judicial determination, and the Court decided squarely that

under that Act an order could be made for the production of books *before the trial,* and made such an order directing the production of the books and papers on a day before the trial, "for the inspection of plaintiff's counsel."

This is not only the first case in which the point now at issue was decided, but it is a leading and well considered case.

TRIPLETT AND NEALE *vs.* BANK OF WASHINGTON, 3 Cranch, 646:

The plaintiffs gave notice to the defendant in advance of the trial to produce "*at the trial* certain letter books to be used in evidence." The Court considered the call or notice too general, and that it had not been shown to the satisfaction of the Court "that the books called or contained *evidence pertinent to the issue.*"

It is stated that Mr. Neale, apparently one of the plaintiffs who had given the notice, orally claimed in Court that he had a right to look at the books before the trial "to see whether there was not something in them pertinent to the issue." The Court thought not, but that was *not* the order asked for. The expression of the opinion of the Court went no further than that it was considered that the applicant for an order to produce books and papers, whether at or before the trial, must satisfy the Court that they contain evidence pertinent to the issue, as a prerequisite to the order.

The plaintiff then gave a fuller notice to produce the books, etc., "*at the trial,*" and moved for an order for such production. It was objected that the notice was still too general, and that there was nothing before the Court to show that there were any such books, or that they contained anything pertinent to the issue. The Court refused to make the order *on that ground,* and on that ground only. It was not a question of the jurisdiction or power

of the Court to make any order for such production either *at* or *before* the trial. It was merely a decision that on the facts before it, the Court was of the opinion that enough had not been shown to satisfy the Court that it should exercise its discretion and make an order for the production of the books at the trial. The case is not at all an adjudication contrary to that in Central Bank *vs.* Tayloe, *supra.* It was made by the same Court, consisting of the same Judges as decided the case of the Central Bank against Tayloe. If they had intended to overrule their own decision in that case, they would certainly have referred to it, and said so.

WALKER *vs.* STEWART, 4 Cranch, C. C., 532:

This case has no bearing upon the question at issue in the case at bar. The defendant had obtained an order for the plaintiff to produce his books *upon the trial.* Upon the trial he called for the books, and the plaintiff's counsel claimed it was too late after the jury was sworn. The Court thought that a motion for a *non pros.* for non-production of the books was not too late, if made on the trial, after the book was in Court and in the possession of the plaintiff's counsel, who refused to produce it. It was then produced. There was then raised the question as to whether if the defendant's counsel inspected the book, that made it competent evidence for the plaintiff. The Court thought it did, and thereupon the counsel declined to inspect it.

JACQUES *vs.* COLLINS, 2 Blatch., C. C., 23:

(Decided in 1846, BETTS, *J.*)

This is the *second case* reported where the question was squarely decided as to whether the Court could make an order under Section 15 of the Judiciary Act for the production of books and papers

for the inspection of the opposing party *before the trial*, and also as to what was necessary to justify the Court to make such an order. It was argued by very able and distinguished counsel on both sides. The defendants presented a *petition* to the Court on notice to the other side, for an order directing the plaintiffs to deposit certain papers, described in the petition, with the Clerk of the Court, for the inspection of the defendants and their counsel *before the trial*, so as to enable them to *"prepare for trial."*

The motion was strongly opposed, but the Court made the order prayed for, and pointed out very clearly and explicitly what must be shown to the Court *by the petition* to justify the order. It thus appears that the proper way to present to the Court the fact that the party called upon for the books has the books called for, and that they contain evidence pertinent to the issue, is by *petition* or *affidavit*, and not by oral evidence, as the petitioners' brief in the case at bar seems to claim.

FINCH *vs.* RIKEMAN, 2 Blatch., 301:

Action for damages for infringement of a patent. The plaintiff moved on an *affidavit* that defendants be ordered to produce their books of account, and that the plaintiff have leave to take copies of such parts thereof as referred to the matters set forth in the affidavit, and that on their failure to produce the books, etc., pursuant to the order, final judgment be rendered against them in the action. The defendant, *by affidavit*, denied the infringement and alleged that they kept no separate entry or account as to any particular job, but that all the accounts were in one book.

This motion was made before Judge BETTS, the same Judge who decided Jacques *vs.* Collins, *supra*. He denied the motion on the following grounds: (1) That Section 15 of the Judiciary Act only

gave power to the Court to direct the production of books and papers in cases and under circumstances in which a Court of Chancery by the ordinary rules of proceeding in that Court would compel the production of the books and documents (p. 302). (2) That the "effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequences will be *to subject the defendants to a penalty* of three times the amount of those damages under Section 14 of the Act of July 4th, 1836, 5 U. S. Stat. at Large, 123," and that *therefore* a Court of equity would not allow a bill of discovery in such a case, "unless the bill relinquishes all claims to the penalty which may be superinduced by the production and exhibition of the books, and *for that cause* the motion must be denied" (p. 304).

Thus it will be seen that the Court did not deny the motion on the ground that it had no power to order a production of the books before the trial, but because the case made out by the affidavit of the moving party was not a "case and under circumstances in which a Court of Chancery by the ordinary rules of proceeding in that Court would compel the production of the books and documents."

Thus it appears that Judge BETTS in this case did not overrule his decision in Jacques *vs.* Collins, *supra.* He put his decision on the ground that the disclosure asked might subject the party moved against to *penalties and forfeitures,* and showed that a Court of Chancery would not compel a party to make such a disclosure by bill of discovery.

IASIGI *vs.* BROWN, 1 Curtis, 401:

There was a motion made in this case on an *affidavit,* to compel the production and delivery to the Clerk of the Court of certain papers alleged to be material on the trial of an action at law. The

existence of the papers and their materiality was not denied. The motion was resisted *"on the ground that the party moving had already filed a bill of discovery,"* covering substantially the same facts and documents; and "it was urged that having resorted to *this* mode of discovery, the party must read the answer, and could not have the benefit of the order under the Act of Congress."

Thus it will be seen that the question of the power of the Court to make an order for the discovery of the books and documents before the trial, *was not raised by counsel on either side,* and the lack of such power was *not urged* as a ground for the denial of the motion. The Court, however, on the hearing, made the following remark:

> "It (*i. e.*, the Act) does not enable parties to compel the production of papers before the trial, but only at the trial, by making such a case and obtaining such an order as the Act contemplates."

And the Court ordered the production of the papers at the trial, or that the parties show cause on the trial why the same were not produced.

The Court cited no cases in support of his dictum, and seems from the opinion not to have given the matter much consideration. He overruled the only point made by counsel in opposition to the motion, and held that the fact that the moving party had filed a bill of discovery was not a bar to making this motion, or to his getting the relief he sought.

MERCHANTS NATIONAL BANK *vs.* STATE NATIONAL BANK, 3 Clifford, 205:

In this case a motion was made by the plaintiff to compel the defendant to produce certain documents or writings in his possession. It does not appear whether the motion was to compel the pro-

duction of the books, etc., *before the trial* or *at the trial.* The motion was denied, but not on the ground that the Court had no power, but on the ground that the Court was not satisfied that a satisfactory case had been made out in the moving papers. The Court said that:

> "The evidence to show that the case is one within the conditions of the provisions is not entirely satisfactory. Were there no other objections to the granting of this motion, we should be constrained to deny it, but there is another even more decisive than those already suggested."

The Court then pointed out that it appeared that the books were in the custody of the bank officers, and would, no doubt, be produced under a *subpœna duces tecum,* but that if that failed to bring them, the Court would find some adequate remedy for the moving party.

In this case the Court does not express a positive opinion that it could not, in a proper case, and on a proper showing, order the production of the books before trial. It does not refer to the Iasigi case, or cite any authority. The Court said:

> "Production before trial is *perhaps* not contemplated by the words of the provision, nor is it generally necessary" (p. 204).

U. S. *vs.* YOUNG, 10 Benedict, 264. (Southern Dist. of N. Y., CHOATE, *J.*):

This was an action to recover a balance of duties on certain imported sugars. A motion was made by the defendant to compel the plaintiff to produce official returns of the weights of the sugars *before the trial.* The motion was made on *affidavits showing that the production and inspection was necessary to enable the defendants to prepare for trial.* Judge Choate granted the motion, and squarely held that the Court had power under Section 724

to order the production of papers for the inspection of the opposing party and their counsel *before the trial;* citing Central Bank *vs.* Tayloe, 2 Cranch, 427, *supra,* and Jacques *vs.* Collins, 2 Blatch., 23, *supra.* The Court also referred to the case of Iasigi *vs.* Brown, *supra,* showing that he had it before him when he made the decision.

UNITED STATES *vs.* HUTTON, 10 Benedict, 268.

(Decided in 1879, CHOATE, *J.*):

In this case too, Judge Choate, in the Southern District of New York, held that all books and writings might be ordered to be produced under Section 724 of the Revised Statutes before the trial, it being shown that they were pertinent to the issue. The Court said:

> "But this statute seems clearly to limit the remedy to cases where the *issue is joined,* one test of the statute to a right to a production of the books and papers being that they contain 'evidence pertinent to the issue'" (p. 278).

The Court then points out that the statute does not take away the right to relief by bill of discovery, and cites Beardsley *vs.* Littell, 14 Blatch., 405.

BEARDSLEY *vs.* LITTELL, 14 Blatch., 405:

In this case, Section 724, under consideration here, was not in question, and was not even mentioned or referred to. The motion was for an *examination of the defendants* before trial under Sections 390 and 391 of the New York Code of Procedure, and Section 914 of the United States Revised Statutes, and it was held that Section 914 did not make it possible to *examine a party* before trial in the United States Courts, and that such an examination was forbidden by Section 861 of the Revised Statutes.

COLGATE *vs.* COMPAGNIE FRANCAISE, 23 Fed. Rep., 82:

No motion was made in that case for a production of the books and papers *before* or *at* the trial. A bill of discovery was filed on the equity side of the Court, and the case came up on a demurrer to the bill; one of the grounds of the demurrer being that the Court should refuse to entertain the bill because under Sections 724 and 858 of the Revised Statutes, and the existing practice in courts of law, discovery no longer was necessary, but that the plaintiff could obtain in a suit at law all necessary evidence by an examination of the officers of the defendant, and by obtaining an inspection of the books and writings containing pertinent evidence. The Court overruled the demurrer, *but did not in any way pass upon the question at issue here,* or upon the construction and application of Section 724 of the Revised Statutes. The question as to whether the books and papers could be ordered to be produced before trial or at the trial was *not raised or considered* in the case. All the Court did say was that by Sections 724, 858 and 914 of the Revised Statutes, a party could not

> "obtain the *testimony of the defendant* before the trial in an action pending in this court, although he could do so in the state courts, because Section 861 of the Revised Statutes, as construed in Beardsley *vs.* Littell, 14 Blatch., 102, requires *such testimony,* unless taken *de bene esse* or by commission, to be taken in the presence of the court and jury at the trial" (p. 83).

There was no question of books and papers in that case. It was a question of obtaining the *testimony of the opposite party* by answers to the bill of discovery.

GUYOT *vs.* HILTON, 32 Fed. Rep., 743:

In that case there was an application under Section 724 for the production of books for inspection before trial. It was denied on the ground that the proper practice to obtain such relief in that circuit was by bill of discovery. Subsequent decisions, both in the Supreme Court and in the Circuit Court, seem to have held otherwise. In *ex parte* Boyd, 105 U. S., 647, the Court said:

> "A bill in equity to compel disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in the pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds or other documents, important as instruments of evidence, *when the court of law in which the* suit is pending *is authorized by summary proceedings* to enforce the *same right.*"

And this seems to have been the view of the same Court in Union Pacific Ry. Co. *vs.* Botsford, 141 U. S., 250.

It was said by the Circuit Court of Appeals in the Fourth Circuit in the Case of Safford *vs.* Ensign Mfg. Co., 120 Fed. Rep., 480, 482:

> "It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States because under Section 724 of the Revst. Statutes it is *no longer generally needed.*"

It was said by Justice BREWER, in Preston *vs.* Smith, 26 Fed. Rep., 884, 889:

> "Finally it is claimed that the bill must be sustained because a discovery is sought. I

> do not understand that a bill can be sustained solely for the purpose of discovery; at least, that is the general rule. Indeed, bills of discovery are *rarely, of late, resorted to.* They have fallen (if I may be permitted to borrow a phrase from the political parlance of the day) into a condition of 'innocuous desuetude.'"

And in Brown *vs.* McDonald, 133 Fed. Rep., 897, it was held by the Circuit Court of Appeals in the Third Circuit, that Sections 724 and 885 of the Revised Statutes

> "have removed *the necessity* of resorting to bills of discovery in ordinary cases, but we are not willing to hold that the statutes have altogether abolished the equitable remedy by bill of discovery."

So that the ground on which Judge LACOMBE, in Guyot *vs.* Hilton, *supra,* denied the motion, has since been decided not to be tenable.

BLOEDE *vs.* BANCROFT, 98 Fed. Rep., 175:

This is the most carefully considered case in the books, on the *exact question here at issue.* It came up in the Circuit Court in the District of Delaware, Judge BRADFORD writing the opinion. That opinion is exhaustive. It goes into the whole history of this section, and considers all of the cases referred to by the petitioners here, and many others, and shows that both on principle and authority the power of the Court here contended for by the respondent and exercised by the Court below exists under Section 724 of the Revised Statutes. We cannot present the question any more clearly than it is presented by Judge BRADFORD in that case. In the course of his opinion, he says:

> "It is, and was, at and prior to the passage of the Judiciary Act, within the settled jurisdiction of chancery, and a usual practice, to

> order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein, and desiring to use the same in *preparing himself for trial.* It must be assumed that Congress was aware that the 'circumstances' under which production might be compelled in chancery, embraced cases where the purpose of the party applying was to inspect, examine and take copies of the books or writings *before the trial* of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the courts in actions at law to order production for inspection *after issue joined,* in all cases and under all circumstances where it might have been ordered in chancery, in aid of parties to such action, and that this court, sitting as a court of law, can in such actions under pain of nonsuit or default, enforce production of books or writings to the same extent, and for the same purposes as when sitting as a court of equity and compelling production in aid of such action" (p. 184).

The Court then goes on to show that the construction of the section that books and writings could only be produced at the trial would

> "be inconvenient, dilatory and expensive, with nothing to justify it, leading to postponements to allow time for inspection, and calculated to embarrass and defeat the due administration of justice" (p. 185).

GRAY *vs.* SCHNEIDER, 119 Fed. Rep., 474:

There was just such a motion as the one made in the case at bar made in that case before Judge LACOMBE, in the Southern District of New York, and the motion was granted on the authority of the Bloede case, *supra.*

UNITED STATES *vs.* NATIONAL LEAD CO., 75 Fed. Rep., 94:

This was a case in the Circuit Court for the District of New Jersey, and the motion for the discovery was made under a section of the State statute as well as under Section 724 of the Revised Statutes. The learned Judge who decided it seems to have misunderstood the words of the section, using, both in the quotation of the section and in his opinion elsewhere, the words "on the trial of actions at law," instead of "in the trial of actions at law," and seems to have laid a good deal of weight upon the words "on the trial." He denied the motion, but not solely, and not apparently principally, upon the ground of want of power of the Court to make the order asked for. The other, and seemingly principal, ground for denying the motion, was that

> "the discovery sought may indeed have no immediate tendency to incriminate the defendant, but that does not militate against the force of the rule that the defendant is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to any accusation of that nature" (p. 97).

The motion was denied, therefore, apparently principally on the ground that it would tend to convict the party of a crime.

KIRKPATRICK *vs.* POPE, 61 Fed., 46:

This case came up in the Circuit Court for the District of Connecticut. A motion was made to compel the defendant to produce its books and records *at the trial of the action*, and *not* before the trial, and the motion was granted. The case does not pretend to decide, or even to consider, whether the Court had the right to order the production of

books and papers *before the trial,* and the case, in no view, is any authority upon that question.

CASSATT *vs.* MITCHEL COAL & COKE CO., 150 Fed. Rep., 32:

This is the only case considered by a Circuit Court of Appeals, referred to in the petitioners' brief, where it has been held that Section 724 of the Revised Statutes did not confer power on the Court to require a party to produce books before trial; and in this case BUFFINGTON, Circuit Judge, dissented.

The action was brought by the Mitchel Coal & Coke Co. against the Pennsylvania R. R. Co., a corporation, to recover damages for its alleged violations of Sections 2 and 3 of the Interstate Commerce Act. The defendant filed a plea of not guilty; and, after issue was joined, and before the trial of the action, the plaintiff filed in the Circuit Court a petition, setting forth that the defendant and Alexander J. Cassatt, President, and John B. Thayer, one of the Vice-Presidents, and ten other specifically named officers and employees of the defendant, had in their possession and power certain books and papers containing evidence pertinent to the issue, and asking for an order requiring the defendant and said officers and employees to produce the said books and papers at the trial, "and also for the inspection of the plaintiff's representatives before trial," under Section 724.

The Circuit Court, after granting an order to show cause, ordered that Cassatt, Thayer and the other officers and employees of the defendant produce on the trial the papers described in the petition, and also that they produce them *before trial* at a specified time and place, for the inspection of the plaintiff, with leave to make copies thereof. Thereupon a writ of error was sued out by the *individual defendants only,* to review that order.

The bulk of the opinion of the Circuit Court of Appeals is taken up with a consideration of the question as to whether that order was "a final decision"; or, in other words, a final decree or final judgment, so that the individual defendants might review it by a writ of error in the Circuit Court of Appeals; and it was held that it was such a final decision, and was reviewable by writ of error.

The Court also was of the opinion that under Section 724 of the Revised Statutes, the Circuit Court had no power to order the production of the books for inspection before the trial. It is to be observed that in this case no order was made directing the "party" defendant in this action (*i. e.*, the Pennsylvania R. R. Co.) to produce any books.

At the same time that the order was made in this action, there seems to have been a like order made in two other actions against the same defendant, the one brought by the Pennsylvania Coal & Coke Co., and the other by the Webster Coal & Coke Co., in which the parties were represented by the same counsel on each side; and that writs of error were sued out by the same individuals to review both of those orders in the Circuit Court of Appeals, at the same term; and in both of which cases a like decision was made by the Circuit Court of Appeals (150 Fed. Rep., 48), without separate opinions, but upon the opinion in the case of Cassatt *vs.* The Mitchel Coal & Coke Co., *supra.*

A writ of *certiorari* was granted by the United States Supreme Court to review the orders in the two latter cases, and on that review the judgments of the Circuit Court of Appeals in the Third Circuit were reversed by this Court, upon the ground that the individual defendants against whom the order was made were not "parties" to the actions, and that the order against them was purely interlocutory, and not a final decision which could be reviewed by the Circuit Court of Appeals on a

writ of error (207 U. S., 181-187). So that it was there determined by this Court, that the Circuit Court of Appeals had no jurisdiction to review the orders in any of those cases; and, therefore, whatever the opinion of the Circuit Court of Appeals in any of those cases contained as to the *power* of the Court to order production of books and papers before the trial, under Section 724, was not an authoritative decision of the question, and was nothing more than an expression of opinion in a case not properly before it, and upon which it had no jurisdiction to pass.

That leaves the decision of the Circuit Court of Appeals in the Second Circuit in the case at bar as the *only decision of a Circuit Court of Appeals upon the subject here at issue.* But if the Circuit Court of Appeals in the Third Circuit had had the right to review the orders in those cases, its reasoning in its opinion on this subject was, we think, unsound. The learned Judge who wrote the opinion refers on page 42 to the case of Bloede *vs.* Bancroft, 98 Fed. Rep., 175, *supra,* but does not answer the reasoning of the learned Judge who wrote the opinion in that case. The Court in the Cassatt case (p. 42), referring to the opinion in the Bloede case, said:

> "In the opinion of the learned Judge who decided that case, there is no reference to Bas *vs.* Steele or Dunham *vs.* Riley."

These cases we have referred to above, the former being found in 3 Wash. C. C., 381, and the latter in 4 Wash. C. C., 124; and we have shown above that in neither of these cases did the question of the right of the Court to order the production of books and papers *before trial* come up for adjudication, and in neither of the cases was the question considered or decided.

The learned Judge in his opinion in the case of Cassatt *vs.* Mitchel Coal & Coke Co., *supra,* said (p. 39), that in chancery under a bill of discovery, the Court might order documents in the possession of one of the parties to be produced "on final hearing, or before the examiner who takes the evidence for final hearing, or even *at any time after filing of an answer.*"

The Court cites no case in support of its opinion on this point (except the case of Iasigi *vs.* Brown, 1 Curtis, 401, *supra*), in which it has been decided that the United States Courts have no power under Section 15 of the Judiciary Act, or Section 724 of the Revised Statutes, to order the production of books before trial, in which the question was really before the Court to be decided. And as we have shown above, in the case of Iasigi *vs.* Brown the motion was not resisted on the ground that the Court had no such power, but upon the ground that the applicant had already filed a bill of discovery to obtain the same relief.

We submit that the reasoning of the Court in that case is unsound, and that it does not answer the reasoning of the Court in Bloede *vs.* Bancroft, *supra,* and that it is contrary to the vast weight of authority in the Circuit Courts in other cases, as we have shown.

We beg to call the Court's attention also to the following cases in the United States Circuit Courts not cited by the petitoners in their brief, in which it has been held that the Circuit Courts had power, under Section 724, to order the production of books and papers before the trial.

CAMERON LUMBER CO. *vs.* DRONEY, 132 Fed. Rep., 304.

(Southern Dist. of N. Y.)

LUCKER *vs.* PHOENIX ASSURANCE CO. OF LONDON, 67 Fed. Rep., 18.

(Dist. of South Carolina.)

In this case the Court said:

> "It seems, however, to be a narrow construction of Section 724 to limit its operation to the actual trial. Its purpose, clearly, is to provide a substitute for a bill of discovery and to secure at law the purposes which such a bill would subserve. All the cases seem to recognize this. On a bill of discovery, necessarily the facts sought would be discovered before trial. Besides this the section says that this order for the production of papers can be made 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.' The proceeding in chancery required the deposit of the papers called for with the clerk, who, upon notice, produced them in court before the examiner (2 Daniell's Ch. Prac., 1388, 1389)."

EXCHANGE BANK *vs.* WASHINGTON CATTLE CO., 61 Fed. Rep., 190.

(Eastern Dist. of Missouri.)

GREGORY *vs.* CHICAGO, MILWAUKEE & ST. PAUL R. R. Co., 10 Fed. Rep., 529.

(Dist. of Iowa.)

In this case the Court points out that inasmuch as the making of the order lies in the discretion of the Court, it can always provide against oppression by not requiring the books of a party to be produced at a great distance from where they are kept, and in case their production would cause a too serious inconvenience to the party whose books were called for, and this answers the argument of the petitioners here on page 25 of their brief.

NEWCOMB *vs.* BURBANK, 159 Fed. Rep., 568.
(Southern Dist. of New York.)

SCHAEFER *vs.* INTERNATIONAL POWER CO., 157 Fed., 896.

Since the decision of the Circuit Court of Appeals, in the Second Circuit, in the case at bar, and since the granting of the writ of certiorari to the Supreme Court in this case, a well-considered decision on the subject has been made by the Circuit Court in the Western District of Missouri, District Judge Van Valkenburgh writing the opinion.

In this opinion the learned Court goes over all the cases above mentioned and some others, and shows clearly that the intention of Section 724 was to permit a discovery of books and papers in the possession of the other side before the trial. (See Rosenberger *vs.* Shubert, 182 Fed. Rep., 411).

In that particular case the Court, while maintaining the proposition that the Court had the power and authority to order a discovery and inspection of the papers of the other side before the trial, denied the application as a matter of discretion in that particular case, and principally on the ground that it did not appear that the party from whom discovery was sought had in its possession or power the books and writings of which discovery was asked.

The Court said:

> "From what is before it the Court cannot say with sufficient certainty at this stage of the proceeding whether the possession and power of these defendants over the writings demanded are sufficient to support a summary rule to produce before trial under pain of the severe penalties provided in this section" (p. 20).

In the case at bar, the Circuit Court, as we already said, has passed upon this matter as a matter of discretion, and that discretion has been affirmed by the Circuit Court of Appeals and will not be reviewed here.

We submit, therefore: (1) That the vast weight of authority in the United States Courts is in favor of the power of the Court to make the orders complained of. (2) That the Courts of most of the States and the English Courts, have the same power by statute. (3) That the power of the Court to make such orders is in furtherance of justice, and the speedy administration thereof, and in accordance with general usage. (4) That sound reasoning and a fair construction of the statute upholds the power of the Court to make the orders complained of.

And on this last consideration, the case of People *ex rel.* Wood *vs.* Lacombe, 99 N. Y., 45, is instructive. In that case the Court of Appeals of the State of New York said:

> "It is the spirit and purpose of the statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be construed so as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some of the provisions of the statute. A reasonable construction should be adopted where there is a doubt or certainty as to the intention of the lawmakers."

II.

Section 724 of the Revised Statutes, under which the orders complained of were made, deals with a question of practice and not of substantive law.

Judge LACOMBE, in Schaeffer *vs.* International Power Co., 157 Fed., 896, on a like motion, said:

> "This is a question of practice not of substantial law; and the practice which was settled for this Circuit in Gray *v.* Schneider (C. C.), 119 Fed., 474, and Cameron Lumber Co. *vs.* Droney (C. C.), 132 Fed., 304, should not be abandoned because of the decision in the Third Circuit in Cassatt *vs.* Mitchell Coal & Coke Company, 150 Fed., 32, 81 C. C. A., 80, especially so, as inspection is granted in proper cases, in a majority of the other Circuits."

III.

The writ should be dismissed, and the order of the Circuit Court of Appeals found on page 35 of the Record affirmed.

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